

**Office of Chief Counsel
Internal Revenue Service
memorandum**

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date: July 20, 2009

to: Davida S. Parker
Program Analyst
(Appeals, Tax Policy and Procedure)

from: Pamela Wilson Fuller
Branch Chief
(Procedure & Administration)

subject: TFRP Timeliness Issue

This memorandum responds to your request for assistance dated April 29, 2009. This advice may not be used or cited as precedent.

ISSUE

Whether Appeals should accept a taxpayer's protest of a proposed trust fund recovery penalty when the file does not contain physical evidence of the date that the Internal Revenue Service received the protest.

CONCLUSION

Whether Appeals should accept a taxpayer's protest of a proposed trust fund recovery penalty when the file does not contain physical evidence that the Internal Revenue Service received the protest depends on the facts and circumstances of each protest.

FACTS

The Service sends Letter 1153 to the taxpayer to advise the taxpayer of a proposed trust fund recovery penalty (TFRP). The taxpayer files a protest to appeal the proposed TFRP. The Service either does not retain the envelope reflecting the postmark or other physical evidence of the date that the Service received the protest or the postmark is illegible on the taxpayer's protest envelope when received by the Service.

LAW AND ANALYSIS

Generally, the Service must assess a tax within three years after the taxpayer files a return. I.R.C. § 6501(a). A timely TFRP protest tolls the assessment statute of limitations. I.R.C. § 6672(b)(3). A taxpayer timely files a protest of a proposed TFRP if the protest is postmarked or mailed by certified mail on or before the 60th day (75th day if the letter was addressed outside the United States) after the mailing date of the Letter 1153 or from the delivery date of the Letter 1153 if personally delivered. I.R.C. § 7502; IRM 8.25.1.2.1.

The best way to evidence the timeliness of a taxpayer's TFRP protest is for Collection to retain the postmark on the protest's mailing envelope. In the case of a faxed protest, the best way to evidence the timeliness of the taxpayer's TFRP protest is for Collection to retain the original faxed document. Consistent with this, the Internal Revenue Manual directs Collection to retain the protest's mailing envelope (or original faxed document) so that the timeliness of TFRP protests can be determined. IRM 5.7.6.1.6. Another way for Collection to document the timeliness of a TFRP protest would be for Collection to stamp the received date on the retained protest letter upon receipt of the letter.

In the event that the postmark on the taxpayer's protest is unreadable or Collection fails to retain physical evidence of the timeliness of a TFRP protest letter, the Service may use a record of regularly conducted activities made near the time of the event in the course of regularly conducted business to prove the timeliness of a TFRP protest. Fed. R. Evid. 803(6). Computerized IRS records are admissible at trial under the above exception to the hearsay rule. Haag v. United States, 485 F.3d 1, 2 (1st Cir. 2007); United States v. Griffin, 191 F.3d 453 (6th Cir. 1999); United States v. Hayes, 861 F.2d 1225 (10th Cir. 1988). For such records to be admissible under the business records exception, the Service must show that the Service kept the computer record in the ordinary course of business and that it was the Service's regular practice to keep such records. Hayes, 861 F.2d at 1228.

In Buttke v. United States, 13 Cl. Ct. 191 (1987), the Court found IRS records that indicated lack of receipt to be sufficient evidence that a taxpayer did not timely mail a document. Other courts have allowed IRS computer transcripts as evidence that a taxpayer failed to file a return but ultimately did not find the evidence persuasive. See In re Boedecker, 161 B.R. 502 (Bankr. D. Mont. 1993). See also Storelli v. Commissioner, 86 T.C. No. 28 (1986) (holding that a postage log that evidenced the date the petitioner's postmarked their petition was insufficient evidence that the petitioners timely filed a Tax Court petition.)

Based on the above, in some cases a contemporaneous Integrated Collection System (ICS) history entry that notes the timeliness of the protest could be sufficient proof of timeliness.¹ When a TFRP protest file contains an ICS history entry kept in the regular

¹ ICS is a system that contains information on taxpayer accounts in collection status.

course of business and it is the originating Collection office's practice to keep such a record, then Appeals should accept the TFRP protest file and toll the assessment statute of limitations until resolution of the protest. Appeals must consider the facts and circumstances of each ICS history entry to determine whether an ICS history entry meets the above requirements. Appeals must make such determinations on a case by case basis.

If there is no direct evidence of timeliness and Appeals cannot determine that Collection made an ICS history entry within the regular course of business where it was the originating Collection office's practice to make such ICS history entries, then Appeals should reject the TFRP protest as untimely. If a responsible party does not file a timely protest, then the responsible party is not entitled to an appeal. An untimely protest does not toll the assessment statute of limitations. If the taxpayer's protest is untimely, the employee handling the proposed TFRP assessment will: (1) contact the taxpayer to notify the taxpayer that the protest was late and the Service will assess the TFRP; (2) advise the taxpayer that he may file Form 843, Claim for Refund and Request for Abatement, once the Service assesses the TFRP; and (3) assess the TFRP. IRM 5.7.6.1.6(5). Should a taxpayer receive notification that the Service considered the protest untimely, a taxpayer may bring forth evidence of the protest's timeliness. If the taxpayer can establish a timely mailing pursuant to § 7502, then Appeals should abate the TFRP assessment and accept the protest for consideration. The assessment statute of limitations would be tolled in such a case.

This writing may contain privileged information. Any unauthorized disclosure of this writing may undermine our ability to protect the privileged information. If disclosure is determined to be necessary, please contact this office for our views.

Please call (202) 622-3600 if you have any further questions.